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European Court of Human Rights: May 2014- April 2015

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THE COURT'S WORKLOAD AND MINISTERIAL CONFERENCE

During 2014 the European Court of Human Rights (hereinafter "the Court") delivered 891 judgments, in respect of 2,388 applications.¹ The Grand Chamber of the Court delivered 19 of those judgments.² Single-Judge Formations, which began operating in 2010, determined (*i.e.* declared inadmissible/struck-out) 78,660 cases in 2014.³ When combined with a decrease in applications allocated to judicial formations of fifteen percent (the total number allocated was 56,250) in 2014, partly explained by the Court's tougher assessment of eligible applications, the Court was able to reduce its backlog of pending cases to 69,900 at the end of December 2014.⁴ This continuing reduction in the size of the backlog, from what President Spielmann described as the "astronomical figure" of 160,000 pending application in 2011, was an "exceptionally positive trend" in the view of the President.⁵ However, President Spielmann has identified repetitive cases (well-founded new applications concerning systemic problems in States which have already been found to breach the European Convention on Human Rights (hereinafter "the Convention" or "the ECHR") as a serious problem. Such cases now comprise more than half of the Court's pending caseload. Consequently the President publicly emphasised "the need for each member State to ensure that endemic problems were resolved at domestic level rather than being brought before the Court."⁶

In March 2015 the Belgian government, acting in its role as Chair of the Committee of Ministers of the Council of Europe, organised a High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility". Ministers of Justice of the Member States, leading figures from the Council of Europe (including the Secretary General, President of the Parliamentary Assembly, President of the Court and the Commissioner of Human Rights), the First Vice President of the European Commission and representatives of non-governmental human rights organizations participated in the two day conference held in Brussels. The

¹ *Analysis of Statistics 2014*, January 2015, Strasbourg, p.5.

² *Annual Report 2014*, January 2015, Strasbourg, p.63.

³ *Supra* n. 1 p.4.

⁴ *Ibid.*

⁵ Opening Speech at the solemn hearing for the opening of the judicial year of the European Court of Human Rights, 30 January 2015, Strasbourg, p.1.

⁶ *President Spielmann presents the results for 2014*, Press Release ECHR 37 (2015), 29 January 2015, Strasbourg.

conference was a follow-up to the Brighton Conference, held three years earlier, when the British government was chairing the Committee of Ministers.⁷

The Court, in its formal contribution to the Conference, expressed the view that

... *sharing* responsibility for the protection of human rights – to be contrasted strongly with any idea of *shifting* responsibility – holds out the prospect of a new, more stable equilibrium in the Convention system, making for a stronger human rights regime in Europe, to the greater benefit of all those who are protected by it.⁸

Regarding the preventing of ECHR violations the Court emphasised the roles of, *inter alios*, national parliaments in considering the human rights implications of legislation they enacted and domestic courts in safeguarding observance of such rights. Furthermore, regarding the optional advisory opinion procedure, created by Protocol No.16 to the ECHR⁹, the Court noted:

...the potential of the procedure to aid national courts in their consideration of Convention issues so that problems are resolved at the national level, and looks forward to its entry into force. Yet to date there have been no ratifications. The Brussels conference should support the Protocol by calling on signatory States to complete the process of ratification, and encouraging more States to accept it.¹⁰

The Conference resulted in the State Parties issuing the Brussels Declaration.¹¹ In that document the Parties reaffirmed their commitment to the ECHR and to the right of individual application to the Court. They also restated “the firm determination of the State Parties to fulfil their primary obligation to ensure that the rights and freedoms set forth in the Convention and its protocols are fully secured at national level, in accordance with the principle of subsidiarity.”¹² Responding to the Court’s contribution to the Conference, the Declaration called on State Parties to “consider signing and ratifying Protocol No. 16”.¹³ The Declaration also contained an Action Plan. This document invited the Court to provide brief reasons for inadmissibility decisions made by single judges from January 2016. The Court was encouraged to consider also providing such reasons for its decisions indicating provisional measures and when the screening panel refuses to accept a case for referral to the Grand Chamber. Under the Plan State Parties were called upon to, *inter alia*, improve the training of national officials on the ECHR and encourage the involvement of national parliaments in the execution of Court judgments. The Plan encouraged the Committee of Ministers to support an increases in the resources

⁷ For a commentary on that event see A. Mowbray, “ECtHR May 2011-April 2012”, 18(4) *Eur. Pub. L.* 566 (2012).

⁸ Paper 26/1/2015 at para. 3.

⁹ See, A. Mowbray, “ECtHR May 2013-April 2014”, 20(4) *Eur. Pub. L.* 579 at p. 582 (2014).

¹⁰ *Supra* n.8 at para.10.

¹¹ 27 March 2015.

¹² *Ibid.* at para. 2. The Court’s use of the latter principle is analysed in A. Mowbray****HRLR article***

¹³ *Ibid.* at para. 14.

of the Department for the Execution of Judgments, which undertakes the detailed work involved in the Committee's supervisory role. By the end of 2019 the Committee of Ministers should decide whether more major reforms of the Convention system are necessary.

Individual applicants and their legal advisers (if they have them) are likely to welcome the Court's intention to start providing reasons for inadmissibility decisions taken by single judges of the Court. As the Belgian Justice Minister noted at the end of the Conference this reform should; "increase transparency, predictability and legal certainty and it would answer legitimate and current expectations of the citizens."¹⁴ However, given the enormous numbers of these decisions made in recent times¹⁵ it is likely that the reasons given will be pretty formulaic if the Court (in reality its Registry staff) are not to be diverted into allocating even more precious resources to dealing with inadmissible applications.

ARTICLE 3: TORTURE OF G8 PROTESTOR

A unanimous Chamber found that the Italian police had tortured a peaceful protestor during the G8 international economic summit held in Genoa during July 2001: in *Cestaro v Italy*¹⁶. Whilst the summit was taking place, between 19 to 21 July 2001, various non-governmental organizations convened an anti-globalisation event in other parts of the city. Violent incidents between some protestors and the police/security forces occurred across Genoa with several hundred persons injured and extensive damage to property being caused. Genoa city council allowed the protestors to use a school as a night shelter. However, local residents notified the police that violent demonstrators, members of the "black blocks", were in the school. During the night of 21- 22 July a police riot squad stormed the school to seek members of the black blocks. The applicant, a man of 62, was inside the school sitting against a wall with his arms raised when the police encountered him. Nevertheless officers kicked him and hit him with their truncheons, causing multiple fractures which left him with permanent damage to his right arm and leg. Three years of investigations by the Genoa public prosecutor's office resulted in 28 officers being prosecuted in connection with the police raid on the school. In 2008, 12 officers were sentenced to between two and four years' imprisonment and with the Ministry of the Interior ordered to pay specified victims between EUR 2,500 and 50,000 compensation. The applicant received a provisional award of EUR 35,000. On appeal the Court of Cassation found that the police raid had been conducted with a punitive aim of reprisal against protestors and the conduct of the officers amounted to torture of the victims.

The Chamber agreed that the applicant had been subjected to torture, noting that the violence inflicted on him had been totally gratuitous and he had done nothing to

¹⁴ *Conclusions de la Conference de Bruxelles*, 27 Mars 2015, p.1. For an earlier academic perspective see J.Gerards, "Inadmissibility Decisions of the ECtHR: A Critique of the Lack of Reasoning", 14(1) *H.R.L.R.* 148 (2014).

¹⁵ *Supra* n.3.

¹⁶ No. 6884/11, 7 April 2015.

warrant the use of such force against him. However, despite the efforts of the public prosecutor, the officers actually responsible for the torture of the applicant had not been identified or punished. This was in part because the police had refused to assist the prosecutor in discovering the identity of the relevant officers. The Chamber deplored the lack of cooperation by the police. Furthermore, the Chamber observed that under Italian law the offences committed against the applicant had become time barred before the appellate stages of the proceedings had been completed. Consequently, the Chamber also found a procedural breach of Article 3 due to inadequate criminal legislation punishing acts of torture. This was a structural failure in Italian law and the Chamber considered that changes were necessary to ensure adequate criminal punishment of such serious ill-treatment. Having regard to the compensation awarded to the applicant during the domestic proceedings the Chamber ruled that Italy should pay him EUR 45,000 just satisfaction in regard to his non-pecuniary damage.

This case disclosed a terrible example of police officers taking the law into their own hands and inflicting extreme violence on a peaceful protestor. The abuse of power by the officers who tortured the applicant was further compounded by the unwillingness of the police authorities to assist the public prosecutor seeking to bring the offenders to justice. It is rare for a long-established State Party to the ECHR to be found liable for acts of torture. Whilst it is absolutely no excuse for the police violence revealed in *Cestaro* we can observe that the Court has already had to determine other complaints involving the G8 Genoa protests that illustrated the aggression being directed against the police and security forces by some protestors. In *Giuliani and Gaggio v Italy*¹⁷, the Grand Chamber found that the applicants' son/brother was a member of a mob attacking two *carabinieri* sitting in their jeep. Despite warnings from the *carabinieri*, the protestor was about to throw a fire extinguisher at the officers when one of them shot him dead. A large majority of the Grand Chamber (13 votes to 4) found the officer's actions fell within the Article 2(2)(a) exception to the right to life, where absolutely necessary force was used in defence of a person from unlawful violence. However, the Grand Chamber was more divided, by ten votes to seven, when it found the planning of the police operations at the G8 summit satisfied the requirements of Article 2.

ARTICLE 6: DELAYED ACCESS TO LEGAL ADVICE DURING QUESTIONING BY THE POLICE

The circumstances where the police can delay a suspect's access to legal advice were examined by a Chamber in *Ibrahim and Others v UK*¹⁸. The background to these combined applications were the four attempted suicide bombings on public transport in London on 21st July 2005. Two weeks earlier four other suicide bombers had killed fifty-two people and injured hundreds of others on underground trains and a bus in London. Three of the applicants detonated explosive devices (containing metal shrapnel), in back-packs they were wearing, whilst travelling on public transport during the 21st July. However, due to the concentration level of the explosive liquid used, the main charges of the applicants' devices failed to explode. They then fled the scenes of their actions. Pictures of the four bombers were recorded by closed-circuit television cameras and the police began a nation-wide hunt for the suspects. The first of the applicants to be arrested, in Birmingham, was Mr Omar early in the morning of 27 July. He was taken to

¹⁷ No. 23458/02, 24 March 2011.

¹⁸ Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 16 December 2014.

a police station in London and informed of his right to consult a solicitor, but that this right could be delayed for up to forty-eight hours. He sought to exercise this right and a Superintendent then determined that Omar should be held incommunicado, under the provisions of the Terrorism Act 2000. Soon afterwards Omar was subject to a series of "safety interviews" by police officers, in accordance with the above Act, designed to gain information in order to protect life and prevent serious damage to property. The officers were trying to discover whether there were more explosive devices and the whereabouts of the other suspected bombers. The answers Omar provided were subsequently discovered to be lies. He was allowed access to a solicitor just after 4pm that day. Mr Ibrahim was arrested, in London, on the 29th July. When he arrived at the police station, at 2:20pm he requested legal assistance. Subsequently a Superintendent determined that he should be held incommunicado and be subject to a safety interview. Ibrahim told the police that he had no knowledge of planned attacks on the public. Subsequently, after being allowed time for sleep, he was given access to a solicitor at just after 10pm. The third applicant, Mr Mohammed, was arrested later in the afternoon at the same address as Ibrahim. He requested legal advice at 4:39pm and a Superintendent authorised a safety interview and denial of immediate access to a lawyer. He refuted any involvement in the attempted bombings on the 21st. After being allowed to pray and eat he was permitted access to a solicitor at 9:45pm. The fourth applicant, Mr Abdurahman, was a friend of one of the attempted bombers. He met the bomber, by chance, at a London railway station on the 23rd July. They returned to Abdurahman's home and the bomber stayed there until the 26th July, according to the applicant because he was frightened of the bomber. Following surveillance evidence the police asked Abdurahman to assist them as a potential witnesses. He agreed and voluntarily went to a police station. Officers began interviewing him at 6:15 on 27th July. Within an hour the officers believed he was providing incriminating statements against himself. A senior officer ordered that Abdurahman should not be given a caution and advised of his right to legal assistance. During the next twelve hours he provided a witnesses statement detailing his involvement with the suspected bomber. He was then arrested, cautioned and notified of his right to legal assistance. He declined the help of a lawyer. On the 30th he was provided with access to a solicitor and subject to further interviews as a suspect.

The first three applicants (and another person) were tried for conspiracy to murder in 2007. Their defence was that although they had detonated the explosives it had merely been a hoax designed to protest against the war in Iraq and they had constructed the devices so that the main charges would not detonate. The trial lasted seven months. The prosecution sought to invoke the answers given by the applicants during their safety interviews, without legal assistance, to demonstrate that the bomb events were not a hoax. Forensic and communications evidence was also presented by the prosecution. The applicants, unsuccessfully, sought to persuade the judge to exclude the safety interviews answers. But, in his summing up to the jury the judge told them that they should take into account that the safety interviews had been conducted without legal assistance for the suspects. The jury convicted the applicants and the judge imposed life sentences on them, with a minimum term of forty year's imprisonment. The Court of Appeal refused the applicants leave to appeal.

The fourth applicant was tried for allegedly assisting one of the conspirators and failing to disclose information about a terrorist incident. He also sought to have his statements given without legal assistance excluded, but the judge refused his request noting that the police had not behaved in an oppressive manner. The jury

convicted him and he was sentenced to ten years' imprisonment. The Court of Appeal found the failure of the police to caution the applicant/notify him of his right to legal assistance when he began making self-incriminatory statements "troubling". Given that he had provided some help to the police, the Court of Appeal reduced his sentence to eight year's imprisonment.

The four applicants complained to the Court arguing that they had suffered breaches of Article 6(1) (right to a fair trial) and Article 6(3)(c) (right to legal assistance) due to their police interviews without legal advice and the subsequent use of their statements during their trials. The Chamber decided to determine the applications without an oral hearing. The Court noted that its main role under Article 6(1) was to assess the overall fairness of the criminal proceedings and that Article 6(3) provided specific elements of a fair trial. Established jurisprudence provided that the right to legal representation could be restricted for good cause. The Grand Chamber had ruled that:

...Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.¹⁹

The Chamber considered that this reasoning contained two components. First did the police have "compelling reasons" to delay access to legal help? The applicants' circumstances were different from *Salduz* as they were only, initially, denied legal assistance after individual determinations by a senior officer (rather than because of a general legal ban on such assistance). Furthermore at the time the police made those decisions they were dealing with an urgent threat of further bombings potentially involving mass murders. Given the scale of the police investigations there were also limited facilities for allowing secure legal access to the applicants. The questioning in the safety interviews of the three applicants suspected of being bombers demonstrated that the police were primarily seeking to discover the extent of the threat to the public rather than the criminal liability of the applicants. Regarding the questioning of the fourth applicant, without a lawyer, the Chamber noted the Court of Appeal's concerns, but he was providing important information about the bombers (three of whom were still at large). Therefore, the Chamber found that:

...it has been convincingly established that at the time of the impugned police interviews there was an exceptionally serious and imminent threat to public safety and that this threat provided compelling reasons which justified the temporary delay of all four applicants' access to lawyers.²⁰

¹⁹ *Salduz v Turkey*, No. 36391/02, 27 November 2008 at para.55.

²⁰ *Supra* n. 18 at para. 203.

The second element of the *Salduz* principle was, accepting that the police had justification for delaying access to lawyers, did the use of statements given by the applicants during those interviews at their subsequent trials cause them such prejudice as to undermine the overall fairness of the proceedings? Regarding the applicants convicted of conspiracy to murder the Chamber noted that they were denied access to lawyers for only between four to eight hours, whilst domestic legislation permitted delays of up to forty-eight hours. Nor did the applicants claim they were subjected to coercion by the police during the safety interviews. The trial judge had undertaken an extensive consideration, including the Court's relevant jurisprudence, of the applicants' request for the safety interview statements to be excluded. This had been reviewed by the Court of Appeal which observed that the applicants had lied during those interviews. The Chamber also acknowledged that there was a "wealth" of other evidence presented against the applicants during their lengthy trial.

In the present case, it must be borne in mind that the applicants, not the prosecution, brought the safety interview statements into play at trial by deploying a defence that was later described by the Court of Appeal as "ludicrous". Their defence had all the hallmarks of being tailored to fit the rest of the prosecution case against them. It would not have struck the correct balance between the applicants' Article 6 right and the general interest in their prosecution if, when faced with that hoax defence, the prosecution had been unable to rely on statements from the applicants that not only undermined that defence but flatly contradicted it.²¹

Therefore, subject to one dissent, the Chamber found no breach of Article 6(1) read in conjunction with Article 6(3) regarding the conspiracy applicants. The same majority also found no breach of these rights in the case of the fourth applicant due, *inter alia*, to the strength of the other evidence produced against him at his trial. Judge Kalaydjieva dissented on several grounds, including her rejection that the police should have been allowed to delay access to lawyers in order protect the investigation from leaks.

Overall, the above judgment is an important elaboration of how the Court will undertake an evaluation of the lawfulness of police delaying suspects access to legal assistance. It is clear that the police have to be facing an extremely dangerous criminal threat to the public to be able to justify such a delay. Sadly, the facts of *Ibrahim and Others* indeed represented that type of scenario. Given the scale of the terrorist threats and the complexity of the ongoing police investigation into the multiple bomb incidents the relatively short time delay in providing the suspects with access to lawyers whilst safety interviews were conducted was a proportionate response. It is commendable that the police delayed access for periods of time considerably less than that allowed by statute. As to the subsequent use of statements obtained during those interviews in the applicants' trials the Court examined whether this had prejudiced the fairness of the proceedings. Given the opportunity of the applicants to dispute this matter before the judge and his reasoned ruling (applying Strasbourg case-law), together with the nature of the conspiracy applicants' defence and other prosecution evidence the Chamber did not find any unfairness. This was a good example of domestic courts and the Strasbourg Court performing their distinct functions harmoniously.

²¹ *Ibid.* at para. 212.

ARTICLE 9 : BAN ON FACIAL COVERINGS

A Grand Chamber ruled on the sensitive topic of a criminal law prohibition of the concealment of the face in public places in *S.A.S. v France*²². The applicant was a French national, who had been born in Pakistan and brought up in the Sunni culture, and she submitted that as a devout Muslim she wore the burqa (a full-body covering including a mesh over the face) and the niqab (a full-face veil with just an opening for the eyes) in accordance with her religious beliefs, culture and personal convictions. She did not always wear the niqab in public or private, but in accordance with her spiritual feelings (e.g. she believed that she should wear it in public during Ramadan). She did not object to having to remove the niqab for security checks in public places (such as at airports) and it was not her intention to annoy other members of the public by her clothing.

In 2009 a parliamentary commission was established in France to examine the wearing of the full-face veil on national territory. The subsequent report noted that the wearing of the full-face veil in France was a recent phenomenon and involved less than 2000 women by 2009. The report found that the practice pre-dated the emergence of Islam and it was not a religious duty, "but stemmed from a radical affirmation of individuals in search of identity in society and from the action of extremist fundamentalist movements."²³ The practice was considered to be contrary to the values of the French Republic according to the parliamentarians. At around the same time the French Advisory Commission on Human Rights produced an opinion against a general ban on the wearing of the full-face veil, because, *inter alia*, of the dangers of stigmatising Muslims. A few days later the Prime Minister requested the *Conseil d'Etat* to undertake a study on the legal grounds for a ban of the full-veil. In the spring of 2010 the *Conseil d'Etat* reported that it could not recommend a general ban on the full-veil alone, but a wider ban on face-coverings in public places would be lawful. A draft Bill was introduced a few weeks later. The accompanying explanatory memorandum expressed the view that the concealment of a person's face in public was, "contrary to the ideal of fraternity" and fell short of "the minimum requirement of civility that is necessary for social interaction".²⁴ Law no.2010-1192 was passed by the National Assembly in July 2010, with just one vote against and three abstentions. The Law made it a criminal offence, punishable with a maximum fine of 150 euros and/or an obligation to attend a citizenship course, for a person to wear in a public place clothing that is designed to conceal the face. An accompanying circular from the Prime Minister elaborated that the ban applied to, *inter alia*, balaclavas, full-face veils and masks. Furthermore, public places included the premises of any public institution and places where the public could

²² No. 43835/11, 1 July 2014.

²³ *Ibid.* at para. 16.

²⁴ *Ibid.* at para. 25.

gain access on payment (e.g. cinemas). In 2013 the Court of Cassation found no breach of ECHR Article 9 (freedom of thought, conscience and religion) in an appeal by a woman convicted under the Law for wearing a full-face veil outside the Elysee Palace (whilst demonstrating against the Law).

The applicant had not been convicted under the Law, but her lawyers (all based in the UK) contended that it violated, *inter alia*, her rights to respect for her private life and freedom to manifest her religious beliefs. The Chamber relinquished jurisdiction to the Grand Chamber (under Article 30 of the Convention). The respondent State sought to justify the statutory ban in accordance with the limitation clauses of Articles 8(2) and 9(2). In the government's view the ban fell within the legitimate aims of protecting "public safety" and "the rights and freedoms of others". The State believed that concealing one's face in public was a rejection of social ties and the principle of "living together". The ban did not discriminate against Muslim women and the light penalty was a proportionate sanction. The Belgian government intervened, a similar ban had been enacted in that State and upheld by its Constitutional Court, submitting that the wearing of a full-face veil was not required by the Koran and the Belgian Parliament sought to foster the integration of all individuals into society. Amnesty International submitted a written brief noting that the right to wear clothing with religious implications was protected by the International Covenant on Civil and Political Rights. Another non-governmental organization (hereafter "NGO"), ARTICLE 19, emphasised the freedom of expression aspect of the wearing of religious dress. The Human Rights Centre of Ghent University provided empirical evidence, based upon the views of 27 Belgian women who wore the full-face veil, that the women did not make that choice under coercion. The Centre requested the Court to consider the applicant's complaints in the light of rising Islamophobia in some European States. Liberty, the British human rights NGO, submitted that the Law, whilst using neutral language, aimed to prohibit the wearing of the burqa in public places. The last third-party intervener was another NGO, the Open Society Justice Initiative, and it argued that there was a European consensus against banning the wearing of full-face veils in public places.

The Grand Chamber accepted the applicant's contention that the wearing of facial clothing was within the scope of Article 8 of the ECHR.

The Court is thus of the view that personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life. ... A measure emanating from a public authority which restricts a choice of this kind will therefore, in principle, constitute an interference with the exercise of the right to respect for private life within the meaning of Article 8 of the Convention...²⁵

However, as the applicant had complained that the French ban affected her choice of clothing required by religious practices the Grand Chamber considered that the case primarily fell to be considered under the freedom to manifest one's religion or beliefs secured by Article 9 of the Convention. Regarding whether the ban could be justified as being for the legitimate aims of "public safety" and "protecting the rights of others", the Grand Chamber rather reluctantly, given the legislative history of the Law, found that the ban fell within the public safety exceptions in Article 8(2) and

²⁵ *Ibid.* at para. 107.

9(2). Likewise the Grand Chamber accepted that the Law's objective of promoting "living together" could also be brought within the second legitimate aim above.

The Court takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.²⁶

But, given the "flexibility" of the idea of "living together", the Grand Chamber stated that it would have to undertake a close scrutiny of the necessity of the French ban.

The Grand Chamber emphasised the subsidiary nature of the ECHR system. "In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."²⁷ This was particularly relevant in relationships between public authorities and religions. Consequently States had to be granted a "wide margin of appreciation" to determine what restrictions were necessary on the manifestation of religious beliefs. The Court would also consider the extent of any consensus between the practices of the State parties when evaluating the lawfulness of particular restrictions. Despite this deference to States the Grand Chamber did not find that the French ban was necessary to protect public safety.

...in view of its impact on the rights of women who wish to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety. The Government have not shown that the ban introduced by the Law of 11 October 2010 falls into such a context. As to the women concerned, they are thus obliged to give up completely an element of their identity that they consider important, together with their chosen manner of manifesting their religion or beliefs, whereas the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud. It cannot therefore be found that the blanket ban imposed by the Law of 11 October 2010 is necessary, in a democratic society, for public safety, within the meaning of Articles 8 and 9 of the Convention.²⁸

As to the proportionality of the ban for the aim of promoting "living together, which the respondent State attached great weight too, the Grand Chamber acknowledged the "significant negative impact" the ban had on the "small number of women" affected. The Court was also very concerned about some Islamophobic comments made during the

²⁶ *Ibid.* at para. 122.

²⁷ *Ibid.* at para. 129.

²⁸ *Ibid.* at para. 139.

introduction of the ban in France, which had been highlighted by certain third-party interveners. Other relevant factors included the ban only applying to facial coverings, not being expressly based on the religious element of such clothing and the light punishments established for breaches of the Law. In respect of the European consensus the Grand Chamber concluded that:

...there is little common ground amongst the member States of the Council of Europe ... as to the question of the wearing of the full-face veil in public. The Court thus observes that, contrary to the submission of one of the third-party interveners... there is no European consensus against a ban. Admittedly, from a strictly normative standpoint, France is very much in a minority position in Europe: except for Belgium, no other member State of the Council of Europe has, to date, opted for such a measure. It must be observed, however, that the question of the wearing of the full-face veil in public is or has been a subject of debate in a number of European States. In some it has been decided not to opt for a blanket ban. In others, such a ban is still being considered... It should be added that, in all likelihood, the question of the wearing of the full-face veil in public is simply not an issue at all in a certain number of member States, where this practice is uncommon. It can thus be said that in Europe there is no consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places.

157. Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed by the Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others".²⁹

Therefore, an overwhelming majority of the Grand Chamber, fifteen votes to two, found no breaches of Articles 8 and 9 of the Convention. Judges Nussberger and Jaderblom dissented as they did not believe that the French ban pursued a legitimate aim under Articles 8 and 9. Regarding the majority's classification of the French justification of the ban, by promoting living together, as falling within protection of "the rights and freedoms of others" the dissenters considered "the concept seems far-fetched and vague."³⁰ Even if the ban fell within a legitimate Convention limitation the dissenters did not accept that it was a proportionate measure. Unlike the majority they would not accord a wide margin of appreciation to France as the ban targeted a clothing code linked to religious, cultural and personal convictions. Furthermore, the dissenters disputed the non-existence of a European consensus against a facial covering ban, as 45 States had not enacted a ban. They also queried the majority's view that the penalties for violating the Law were mild, as the recurrent practice of wearing a full-face veil was likely to result in multiple punishments. Overall the dissenters concluded, "we find that the criminalisation of the wearing of a full-face veil is a measure which is disproportionate to the aim of protecting the idea of "living together"- an aim which

²⁹ *Ibid.* at paras. 156-157.

³⁰ Joint Partly Dissenting Opinion of Judges Nussberger and Jaderblom at para. 5.

cannot readily be reconciled with the Convention's restrictive catalogue of grounds for interference with basic human rights."³¹

The majority's deference to the policy-decision to ban full-face coverings in public places, reached via the French legislative process, chimes with the repeated emphasis on the subsidiary role of the Court under the ECHR system propounded by States during recent inter-governmental conferences and their amendment of the Preamble to the Convention contained in Protocol 15.³² Nevertheless, the majority did not accept that the general ban was necessary on public safety grounds. Hence even where the Court is according States a wide margin of appreciation there is still European supervision and the Court may not find some interferences by public authorities to be compatible with the Convention. Noting the dissenters' views regarding the legitimacy of the living together aim invoked by France and the nature of the European consensus it may well be that the majority's generous evaluations of these elements, in favour of the respondent State, was another aspect of the Grand Chamber's reluctance to rule against a Law that had received extensive parliamentary endorsement.

ARTICLE 41: JUST SATISFACTION IN AN INTER-STATE CASE

A Grand Chamber delivered the first judgment of the Court on the ability of a successful applicant State to claim damages, under Article 41, from the respondent State in *Cyprus v. Turkey (Just Satisfaction)*³³. This momentous litigation³⁴ had begun in 1994 with an application brought by Cyprus alleging breaches of many Convention rights by Turkey as a consequence of the latter's invasion of northern Cyprus during 1974. The applicant government and the (former) European Commission of Human Rights referred the application to the Court in 1999, in accordance with the pre-Protocol 11 Convention system. Following discussions, between the President of the Court and the State Agents of Cyprus and Turkey, the former wrote to the State Parties (in November 1999) informing them that Cyprus did not need to submit any claim for just satisfaction at that stage of the proceedings. A further procedure dealing with such claims would be held at a later date depending upon the Court's judgment on the merits of Cyprus' complaints. In May 2001 the Grand Chamber determined that Turkey had violated numerous Articles of the ECHR.³⁵ The judges were unanimous in concluding that the issue of just satisfaction should be adjourned for consideration at a later date. The Committee of Ministers assumed responsibility for supervising that judgment, under Article 46 of the ECHR, a process which was still continuing in May 2014.

During August 2007 the Cypriot government notified the Court that it intended to submit an application for the consideration of Article 41 in respect of the 2001 merits

³¹ *Ibid.* at para. 25.

³² See *supra* n.9 p.580.

³³ No. 25781/94, 12 May 2014.

³⁴ See, A. Mowbray, *Caes, Materials & Commentary on the ECHR*, (3d. ed., Oxford U.Press, 2012) p.124.

³⁵ *Cyprus v Turkey*, No. 25781/94, 10 May 2001.

judgment. In March 2010 Cyprus submitted just satisfaction claims regarding the missing persons (the 2001 judgment had found breaches of Articles 2, 3 and 5 concerning more than one thousand persons who had disappeared during the invasion in 1974). The Cypriot authorities reserved their claims for just satisfaction regarding other Convention violations found in the 2001 judgment. Subsequently, both parties filed observations and in 2011 the Cypriot government requested the Court to take action to facilitate the enforcement of the 2001 judgment. Following Court deliberations Cyprus was asked, in March 2012, to submit a final set of just satisfaction claims. This was done in June 2012, when Cyprus added claims in respect of enclaved Greek Cypriots living on the Karpas peninsular (whose rights under Articles 3, 8, 9, 10, 13 and Article 2 of Protocol No 1 to the Convention had been found to have been infringed in the 2001 judgment).

The Grand Chamber reached its just satisfaction judgment after a series of private deliberations and without a public oral hearing. Turkey had argued that, even assuming that Article 41 applied to inter-State cases the applicant's claims for just satisfaction ought to be dismissed for undue delay. The Grand Chamber, subject to the dissent of the Turkish Judge Karakas, determined that the passage of time since the merits judgment had not rendered the just satisfaction claims inadmissible. Whilst the majority acknowledged that general international law requires applicant States to bring their claims without undue delay³⁶, in this litigation the impugned delay occurred after the Court had delivered its judgment on the merits. Furthermore, the Court had adjourned the issue of claims for just satisfaction in that judgment and subsequently the Cypriot government had never waived its claims. The Grand Chamber also sought to distinguish between its role to determine claims for just satisfaction and the supervisory responsibilities of the Committee of Ministers³⁷.

Insofar as the Turkish Government have referred to the supervisory proceedings before the Committee of Ministers, the Court reiterates that findings of a violation in its judgments are essentially declaratory, and that, by Article 46 of the Convention, the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers (*Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 61, ECHR 2009). In this respect, one should not confuse, on the one hand, proceedings before the Court which is competent to find violations of the Convention in final judgments which are binding on the States Parties (Article 19, in conjunction with Article 46 § 1), and to afford just satisfaction (Article 41) where relevant, and, on the other hand, the mechanism for supervising the execution of judgments, under the Committee of Ministers' responsibility (Article 46 § 2). Under Article 46, the State Party is under an obligation not just to pay those concerned the sums awarded by the Court by way of just satisfaction, but also to take individual or, if appropriate, general measures in its domestic legal order, or both, to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant,

³⁶ Following the International Court of Justice's judgment in *Certain Phosphate Lands in Nauru (Nauru v. Australia, Preliminary Objections)*, 1992 ICJ Rep. 240.

³⁷ On this process see B. Cali & A. Koch, "Foxes Guarding the Foxes? Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe", 14(2) *H.R.L.R.* 301 (2014)

as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (*ibid.*, § 85). Albeit connected with each other, the obligation to take individual or general measures, or both, and the payment of just satisfaction are two distinct forms of redress, and the former in no way precludes the latter.³⁸

Regarding the applicability of Article 41 to inter-State complaints Cyprus contended that the text of that Article does not distinguish between individual and inter-State cases. The original Court had not declared just satisfaction claims to be inapplicable in *Ireland v. UK*³⁹, merely that it was not necessary for the Court to apply the relevant Article in that case. Turkey responded that Article 41 did not apply to inter-State cases as, according to the former European Commission of Human Rights⁴⁰, the applicant State in such cases was acting to vindicate the public order of Europe, rather than the rights of the State or its nationals. Additionally, in accordance with the Court's jurisprudence, just satisfaction was related to factors such as victims' pain and suffering, distress and feelings of injustice. In the view of the respondent government those factors exclusively concerned natural persons.

The Grand Chamber acknowledged that it had not been necessary for the Court to apply former Article 50 of the ECHR⁴¹, governing just satisfaction, in *Ireland v. UK* as the applicant government had expressly declared that they were not seeking financial compensation for victims. Having regard to the *Travaux préparatoires* of the ECHR the Grand Chamber believed that the intention behind the Convention's provision on just satisfaction was derived from public international law principles relating to State liability. The most significant of these was that breach of a legal obligation requires adequate reparation. Consequently, the Grand Chamber could not adopt a restrictive interpretation of the scope of Article 41.

The Court therefore considers that Article 41 of the Convention does, as such, apply to inter-State cases. However, the question whether granting just satisfaction to an applicant State is justified has to be assessed and decided by the Court on a case-by-case basis, taking into account, *inter alia*, the type of complaint made by the applicant Government, whether the victims of violations can be identified, as well as the main purpose of bringing the proceedings insofar as this can be discerned from the initial application to the Court. The Court acknowledges that an application brought before it under Article 33 of the Convention may contain different types of complaints pursuing different goals. In such cases each complaint has to be addressed separately in order to determine whether awarding just satisfaction in respect of it would be justified.⁴²

³⁸ *Supra* n.33 at para. 27.

³⁹ No. 5310/71, 18 Jan. 1978.

⁴⁰ *Austria v. Italy*, No. 788/60, 11 Jan 1961.

⁴¹ See, A. Mowbray, "The European Court of Human Rights' Approach to Just Satisfaction", [1997] *Public Law* 647.

⁴² *Supra* n.33 at para. 43.

The Grand Chamber expressed the view that where an applicant State complained about general issues, such as systemic breaches or violations resulting from an administrative practice, then the primary goal of the applicant was to safeguard public order in Europe and it may not be appropriate for the Court to award just satisfaction, even when claimed by the applicant. A different category of inter-State complaints were those where the applicant State alleged that the respondent State had violated the Convention rights of the former State's nationals or other victims. The Grand Chamber considered that this category of complaints had many similarities with individual applications (brought by victims under Article 34 of the ECHR) and with claims made under diplomatic protection by States. It could be appropriate for the Court to award just satisfaction for successful complaints in this category of inter-State cases.

However, it must be always kept in mind that, according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims.⁴³

Given that Cyprus had made just satisfaction claims in respect of Convention violations regarding two identifiable groups of people (the 1,456 missing persons and the enclaved Greek Cypriot residents of the Karpas peninsular) and the applicant State had not sought compensation on behalf of itself, the Grand Chamber determined that the granting of just satisfaction would be appropriate.

The Cypriot government initially requested EUR 12,000 per missing person, for distribution to their families. This was the amount awarded by the Court in separate Article 34 litigation by some family members who had successfully complained that Turkey had not conducted effective investigations into the disappearances of their relatives.⁴⁴ Subsequently, the Cypriot government sought an unspecified greater sum to reflect higher awards in more recent cases. The Turkish government replied that the Court had not detailed the number of missing persons in its merits judgment and the number of potential beneficiaries had altered over time (aggravated by the applicant government's delay in seeking just satisfaction). Regarding the Karpas residents the Cypriot government sought a "modest" payment of at least £50,000 per individual for their non-pecuniary losses. Turkey responded that the applicant had taken eleven years to make this claim and had failed to identify the number of potential beneficiaries.

The Grand Chamber endorsed its earlier view in *Varnava and Others* that:

In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right. ... In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to

⁴³ *Ibid.*, para.46.

⁴⁴ *Varnava and Others v. Turkey*, No. 16064/90, 18 Sep. 2009.

function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned.⁴⁵

The Grand Chamber found that there was no doubt about the protracted anxiety suffered by the Karpas residents due to the violation of numerous of their Convention rights. Therefore, the Grand Chamber (by 15 votes to 2) ordered that Turkey pay EUR 60 million for the non-pecuniary damage suffered by the Karpas residents and EUR 30 million for the non-pecuniary damage suffered by the relatives of the missing persons. Those sums were to be distributed by the applicant government to the individual victims of the relevant breaches of the ECHR. Distribution should be completed within eighteen months of the payments by Turkey (or other time-frame specified by the Committee of Ministers exercising its role of supervising the execution of Court judgments under ECHR Article 46).

During the above just satisfaction proceedings, in November 2011, the applicant State asked the Court to issue a "declaratory judgment", *inter alia*, stating that in accordance with the merits judgment and Article 46 of the Convention Turkey was required to "abstain from permitting, participating or acquiescing or being otherwise complicit in, the unlawful sale and exploitation of Greek Cypriot homes and property in the northern part of Cyprus". In its just satisfaction judgment the Grand Chamber concluded that it was not necessary to consider if the Court had the competence to make such a declaration as Turkey was bound by the relevant parts of the merits judgment.

It is recalled in this connection that the Court has held that there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights (section III, point 4 of the operative part of the principal judgment). It thus falls to the Committee of Ministers to ensure that this holding which is binding in accordance with the Convention, and which has not yet been complied with, is given full effect by the respondent Government. Such compliance could not, in the Court's opinion, be consistent with any possible permission, participation, acquiescence or otherwise complicity in any unlawful sale or exploitation of Greek Cypriot homes and property in the northern part of Cyprus. Furthermore the Court's decision in the case of *Demopoulos and Others* [v. Turkey]⁴⁶ to the effect that cases presented by individuals concerning violation of property complaints were to be rejected for non-exhaustion of domestic remedies,

⁴⁵ *Ibid.*, at para. 224.

⁴⁶ No. 46113/99, 5 Mar. 2010.

cannot be considered, on its own, to dispose of the question of Turkey's compliance with section III of the operative provisions of the principal judgment in the inter-State case.⁴⁷

However, within the Grand Chamber there were sharply differing opinions about the above statement. Nine judges issued a concurring opinion in which they wrote:

The present judgment heralds a new era in the enforcement of human rights upheld by the Court and marks an important step in ensuring respect for the rule of law in Europe. It is the first time in the Court's history that the Court has made a specific judicial statement as to the import and effect of one of its judgments in the context of execution.

The Court's statement, couched in strong and clear terms, is directed to a particular aspect of the execution process still pending before the Committee of Ministers. It is rendered all the more powerful, in what it signifies, by reason of the view expressed by the Court that, in the circumstances, such statement does, of itself, obviate the need to examine whether a formal declaratory judgment for the purposes of Article 46 of the Convention might be issued under Article 41. The Court has spoken: it remains for it to be heard.⁴⁸

Whereas five judges considered that the Court had exceeded its' authority under the Convention by commenting, in the last sentence of paragraph 63 above, on the Committee of Ministers continuing supervision of the merits judgment.

In our view, such a statement- even if it is not contained in the operative provisions- seeks to extend the powers of the Court and runs counter to Article 46(2) of the Convention by encroaching on the powers of the Committee of Ministers of the Council of Europe, to which the Convention has entrusted the task of supervising execution of the Court's judgments.

7. The Court does not have jurisdiction to verify whether a Contracting Party has complied with the obligations imposed on it by one of the Court's judgments...⁴⁹

The protracted process of the Committee of Ministers' seeking to secure Turkey's compliance with the inter-State merits judgment⁵⁰ combined with a series of individual applications raising overlapping complaints provided the backdrop to the Grand Chamber's unique statement regarding Turkey's obligations flowing from the 2001 judgment.

The Grand Chamber was more united in its clear ruling that financial compensation could be awarded, under Article 41 of the Convention, in appropriate

⁴⁷ *Supra* n.33 at para. 63

⁴⁸ Joint Concurring Opinion of Judges Zupancic, Gyulumyan, David Thor Bjorgvinsson, Nicolaou, Sajo, Lazarova Trajkovska, Power-Forde, Vucinic and Pinto De Albuquerque.

⁴⁹ Partly concurring opinion of Judges Tulkens, Vajic, Raimondi and Bianku, joined by Judge Karakas.

⁵⁰ For example at the Ministers' Deputies 1214 DH Meeting, (Dec 2014), the enhanced supervision of the execution of the inter-State merits judgment was continued.

inter-State cases. The key factor being whether the Court finds that individuals have suffered as a consequence of the respondent State's breaches of their Convention rights and freedoms. Uncertainties as to the scope of this financial liability remain, for example can a successful applicant State claim just satisfaction in respect of the pecuniary losses of individuals (note, Cyprus had sought to reserve just satisfaction claims regarding the homes and property of Greek Cypriots in northern Cyprus adversely affected by the 1974 invasion and its aftermath)? Also, will applicant States be able to make just satisfaction claims on behalf of non-human victims, such as companies⁵¹ who are eligible to bring their own individual applications under Article 34 of the ECHR? It is interesting to note that making "its assessment on an equitable basis"⁵² the Grand Chamber's aggregate award for the surviving relatives of the missing persons works out at approximately EUR 20,000 per missing person, over fifty percent higher than the original sum claimed by the Cypriot government.

Judge Pinto De Albuquerque, from Portugal, issued a lengthy and strongly argued (with parts in underlined text) concurring opinion.

The *Cyprus v. Turkey* (just satisfaction) case is the most important contribution to peace in Europe in the history of the European Court of Human Rights ("the Court"). The Court has not only acknowledged the applicability of Article 41 of the European Convention on Human Rights ("the Convention") to inter-State applications and established criteria for the assessment of the time-limit for these just satisfaction claims, but has awarded punitive damages to the claimant State. The message to member States of the Council of Europe is clear: those member States that wage war, invade or support foreign armed intervention in other member States must pay for their unlawful actions and the consequences of their actions, and the victims, their families and the States of their nationality have a vested and enforceable right to be duly and fully compensated by the responsible warring State. War and its tragic consequences are no longer tolerable in Europe and those member States that do not comply with this principle must be made judicially accountable for their actions, without prejudice to additional political consequences.⁵³

He explained that that the terms "punitive damages", as used in the USA and continental Europe and "exemplary damages" as used elsewhere in the Commonwealth had the same meaning. "Punitive or exemplary damages are understood as being established with the purpose of atoning for the deeds of the wrongdoer and preventing repetition of the wrongful act by the offender or emulation by third parties, without being limited to mere compensation for the pecuniary and non-pecuniary losses caused to the claimant, including loss of profit."⁵⁴ He sought to demonstrate that the Court's jurisprudence disclosed the awarding of punitive damages in a number of different contexts.

⁵¹ See for example, *East/West Alliance Ltd v. Ukraine*, No.19336/04, 23 Jan. 2014.

⁵² *Supra* n.33 at para. 58.

⁵³ Concurring Opinion of Judge Pinto De Albuquerque at para. 1.

⁵⁴ *Ibid.* at footnote 1.

Summing up, the Court has been at the forefront of an international trend, using just satisfaction to prevent further violations of human rights and punish wrongdoing governments. The acknowledgment of punitive or exemplary damages under the Convention is essential in at least three cases: (1) gross violations of human rights protected by the Convention or the additional Protocols, especially when there are multiple violations at the same time, repeated violations over a significant period of time or a single continuing violation over a significant period of time; (2) prolonged, deliberate non-compliance with a judgment of the Court delivered with regard to the recalcitrant Contracting Party; and (3) the severe curtailment, or threat thereof, of the applicant's human rights with the purpose of avoiding, impairing or restricting his or her access to the Court as well as the Court's access to the applicant.

...

Therefore, punitive damages are an appropriate and necessary instrument for fulfilling the Court's mission to uphold human rights in Europe and ensuring the observance of the engagements undertaken by the Contracting Parties in the Convention and the Protocols thereto (Article 19 of the Convention). This conclusion applies with even greater force in the case at hand, where the respondent State not only committed a multitude of gross human rights violations over a significant period of time in Northern Cyprus, and did not investigate the most significant of these violations adequately and in a timely manner, but also deliberately failed year after year to comply with the Grand Chamber's judgment on the merits delivered a long time ago with regard to these specific violations.

Whilst many will agree with the Judge's sentiments regarding the importance of legal sanctions against European States that utilise military force against fellow members of the Council of Europe, his arguments regarding the Court's ability to award punitive damages is in direct contrast to the more cautious attitude expressed in the Grand Chamber's judgment⁵⁵. It is also significant that despite consideration, during the drafting of Protocol no.14 to the ECHR⁵⁶, of the possibility of conferring the power for the Court to impose financial penalties on a respondent State that had failed to implement an earlier judgment against it, the final text did not provide for such a power within revised Article 46 of the ECHR.

ARTICLE 4 of Protocol No.4: INTER-STATE JUDGMENT

A Grand Chamber delivered only the third judgment by the Court on the merits of an inter-State application in *Georgia v Russia(I)*⁵⁷. The case concerned the alleged mass arrest, detention and deportation of Georgian citizens from Russia in late 2006 to early 2007. The background to this campaign was the "political tensions"⁵⁸ that had developed

⁵⁵ *Supra* n.43.

⁵⁶ See *supra* n.34 pp-18-20.

⁵⁷ No.13255/07, 3 July 2014.

⁵⁸ *Ibid.*, para. 22.

between these neighbouring States and the arrest of four Russian officers in Tbilisi, the Georgian capital, at the end of September 2006. Russia then suspended all air, road, rail, maritime, postal and financial connections with Georgia. Soon afterwards international and non-governmental organizations began reporting widespread Russian expulsions of Georgian nationals from its territory. Georgia lodged this application in March 2007, alleging the Russian authorities' actions constituted an "administrative practice" violating a number of Articles of the Convention and additional Protocols. In June 2009 a Chamber declared the application admissible and in December of that year relinquished jurisdiction (under Article 30 of the ECHR) to the Grand Chamber.

The Grand Chamber adopted the unusual procedure of holding an *in camera* oral hearing of witnesses, before a panel of five Grand Chamber judges, to help "clarify" the facts underlying the complaints. Each State party was invited to nominate ten witnesses they wished the Court to hear and the Court invited a further five witnesses that it selected. The oral hearings took place at Strasbourg early in 2011. Most of the Georgian witnesses were persons who had been subject to arrest, detention and expulsion from Russia during the relevant time period. The Russian witnesses were officials having various responsibilities connected with the subject-matter of the application (e.g. an Inspector in the Federal Migration Service at Moscow and the Deputy Head of the Civil Security Force Moscow). Two witnesses selected by the Court were heard (Mr G. Tugushi, Human Rights Officer with the Organization for Security and Co-operation in Europe mission to Georgia at the relevant time and Mr E. Matyas, Rapporteur of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe at the material time). Three other Russian witnesses invited by the Court, including the Acting Head of the Directorate of Internal Affairs of Leningrad at the relevant time, did not attend due to various reasons including the sudden admission to hospital of the witness or the Russian authorities' refusal to serve a witness summons on the named person. Summaries of the evidence given were appended to the judgment subsequently delivered by the Grand Chamber. A normal oral hearing in public was held by the Grand Chamber on the merits of the application in June 2012.

A key part of Georgia's evidence that Russia had engaged in an administrative practice were two circulars issued by the Main Directorate of Internal Affairs of St Petersburg on 30 September and 2 October 2006 which, *inter alia*, ordered that "large-scale measures be undertaken to identify as many citizens of the Republic of Georgia as possible who are unlawfully residing on Russian territory and deport them." Despite repeated requests by the Court for Russia to provide copies of the circulars the respondent State refused to do so. Russia admitted the existence of the circulars, but denied their content was that asserted by Georgia, and claimed that the circulars were "State secret" and therefore disclosure was prohibited under national law. Given the importance of these documents the Grand Chamber began by considering whether Russia had complied with its duty, under Article 38 of the ECHR, to "furnish all necessary facilities" towards the Court's examination of the case. The Grand Chamber held that its approach to Article 38 developed in applications brought by individuals should also apply to inter-State complaints. Hence a failure by a State to provide information at its disposal without a satisfactory reason could be taken account of by the Court when drawing evidential inferences and in determining if a breach of Article 38 had occurred. The Grand Chamber doubted the classification of the two circulars as secret given that

their implementation required widespread dissemination amongst many public officials at different levels of seniority. Therefore, subject to the dissent of the Russian judge, the Grand Chamber found that Russia had violated Article 38.

Georgia submitted that the witnesses they had presented before the Court clearly demonstrated that there had been an organised campaign against Georgian nationals introduced by the Russian authorities during the relevant time and that was further reflected in the increased numbers of Georgians expelled at that time. Russia contested those claims. The Grand Chamber reaffirmed the established jurisprudence that an administrative practice required two elements; "repetition of acts" and "official tolerance".⁵⁹ As the respondent State had failed to provide the Court with monthly expulsion statistics the Grand Chamber accepted the Georgian assertion that over 4,600 expulsion orders had been issued between September 2006 and January 2007 against its nationals and nearly 2,400 of those had been detained and forcibly expelled. The Court also had regard to reports produced by international governmental and non-governmental organisations (include the Parliamentary Assembly and Human Rights Watch) which confirmed the statements given by the Georgian witnesses. Taking account of its finding of a breach of Article 38, noted above, the Grand Chamber found a "strong presumption"⁶⁰ that the content of the Russian circulars were as alleged by Georgia. "Having regard to all those factors, the Court concludes that from October 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals was put in place in the Russian Federation which amounted to an administrative practice for the purposes of Convention case-law."⁶¹ Furthermore, as the applicant government had asserted such a practice as the basis of its application (rather than seeking Court determinations of alleged breaches in respect of specified individuals) it was exempt from the requirement to exhaust domestic remedies in Russia.

The first substantive breach alleged by Georgia was that Russia had undertaken a collective expulsions of aliens (Georgian nationals) prohibited by Article 4 of Protocol No. 4. The applicant State contended that the Russian judicial authorities had not examined the merits of the individual expulsion decisions concerning Georgians. Witnesses and international/non-governmental reports confirmed that Russian judges had, *inter alia*, used standard form expulsion orders and failed to consider the specific factual circumstances of cases. The responded State disputed the credibility of the Georgian witnesses. The Grand Chamber reaffirmed the Court's established jurisprudence regarding Article 4 of Protocol No. 4, that a breach occurred where collective expulsions did not involve "a reasonable and objective examination of the particular case of each individual alien of the group".⁶² The Grand Chamber noted the Parliamentary Assembly Monitoring Committee had found routine deportation procedures being applied to the Georgians involving brief (two to ten minute) court proceedings, normally without lawyers. Also, the Georgian witnesses gave similar accounts of their deportations.

⁵⁹ *Ibid.* at para 122.

⁶⁰ *Ibid.* at para. 140.

⁶¹ *Ibid.* at para. 159.

⁶² *Ibid.* at para. 167.

Therefore, subject to the dissent of the Russian judge, the Grand Chamber found Russia had breached Article 1 of Protocol No. 4 by its administrative practice.

By the same majority the Grand Chamber went on to conclude that Russia had breached the right to liberty (guaranteed by ECHR Article 5(1)) and the right to judicial scrutiny of the lawfulness of detention (provided by ECHR Article 5(4)). The “collective” nature of the arrests of Georgians living in Russia meant that they were arbitrary, and therefore unlawful, under Article 5. Likewise the majority also found the extremely overcrowded conditions of detention in which the Georgians were held, for between a few hours and a couple of days in police cells followed by up to two weeks in detention centres, amounted to an administrative practice of both inhuman and degrading treatment in violation of ECHR Article 3. In reaching that determination the Grand Chamber expressed the view that it found the testimony of the Georgian witnesses more credible than that of the Russian officials. By large majorities the Grand Chamber also found breaches of ECHR Article 13 (right to an effective domestic remedy) in conjunction with Article 5(1) and Article 3.

An overwhelming majority of the Grand Chamber (sixteen votes to one) held that it was not necessary for the Court to examine Georgia’s complaints that the Russian practice amounted to discriminatory treatment, in breach of Article 14 of the Convention in conjunction with the above substantive rights, or a violation of Article 18 of the ECHR⁶³ when combined with those rights. Judge Tsotsoria, from Georgia, wrote a lengthy partly dissenting opinion in which she, citing reports by Human Rights Watch and the Parliamentary Assembly, expressed the belief that:

The illegal anti-Georgian policy should be viewed in the light, and as a direct result, of the political statements made by leading members of the Russian Government, including the President, Foreign Minister, Deputy Head of the Federal Migration Service, Speaker of the State Duma and Defence Minister. ...

The violation of the rights of Georgians based on their nationality and ethnic origin was deeply rooted in discrimination, which is the fundamental aspect of the present case. Accordingly, failure to examine Article 14 artificially reduces the scope of the non-discrimination provision of the Convention and disregards the very core feature of this inter-State application...⁶⁴

Judge Dedov, from Russia, also produced a long dissenting opinion in which he was highly critical of the majority’s methods of establishing the facts in this disputed case. He believed that the Grand Chamber had relied on reports from international organizations that had not provided a documentary basis for their findings. Furthermore he considered that reports from “human-rights activists” may “exaggerate the gravity of violations”.

I regret that I cannot share the opinion of the majority, who have found a violation of various Articles of the Convention in the present case. In my view, the Court has taken a controversial approach to the establishment of the facts, assessment of the

⁶³ Which states: “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

⁶⁴ Supra n.57 , Partly Dissenting Opinion of Judge Tsotsoria at pp. 65 & 69.

evidence and application of its own case-law which is hardly acceptable in a situation of strong political opposition between the high authorities of the applicant and respondent States. In such a situation the Court has to carefully examine all the materials and make well-founded conclusions in order to avoid any concerns being raised about its impartiality. This task would be much easier if the hearings and deliberations in any inter-State case were held by the Court only after peaceful negotiations had been conducted between the parties to mitigate political and emotional tensions. Without such measures a rational analysis of cases like this can never be successful.⁶⁵

Georgia v Russia (I) dramatically illustrates the type of rare situation where a Member State of the Council of Europe is willing to resist the institutional pressures of collaborative relationships and activities to launch a formal complaint before the Court against a fellow State Party. Clearly the Grand Chamber's findings as to the background events to this litigation disclosed that bi-lateral relations between Georgia and Russia had become completely fractured. Presumably, therefore, the applicant State did not fear that initiating an inter-State complaint would create any greater damage to its relations with the respondent State. Indeed, during the next year serious armed conflict occurred between the two States; that is the subject-matter of a second inter-State case brought by Georgia. The Court will also have to return to the above case as the matter of just satisfaction has been left pending. Georgia requested the Grand Chamber "to award just satisfaction under Article 41, namely, compensation, reparation, *restitutio in integrum*, costs, expenses and further and other relief to be specified for all the pecuniary and non-pecuniary damage suffered or incurred by the injured parties as a result of the violations and the pursuit of these proceedings."⁶⁶ However, the Grand Chamber decided that the application of Article 41 was not ready for examination and the parties should submit their written observations on that matter to the Court within twelve months. Optimistically, the Grand Chamber invited them to notify the Court of any agreement they reached.

The judgment in *Georgia v Russia (I)* is, sadly, another example of a high-profile case where the Grand Chamber has found that Russia failed, without good cause, to supply the Court with crucial documentary evidence in its possession. As we noted in last year's rapport Russia likewise refused to disclose key documentation on the investigation into the Second World War Katyn and related massacres committed by USSR personnel to the Court.⁶⁷ These are worrying demonstrations of the Russian government's unconstructive attitude towards the Court and its Convention duties.

Regarding other pending inter-State applications against Russia⁶⁸, in April 2015 the Court announced that it had granted Russia an extension of time, until 25 September 2015, to file its observations on the admissibility of the two Article 33

⁶⁵ *Ibid.* Dissenting Opinion of Judge Dedov at p.87.

⁶⁶ *Ibid.*, at para. 239.

⁶⁷ *Supra* n.9 at p.585 analysing *Janowiec and Others v Russia*, Nos. 5508/07 and 29520/09, 21 Oct. 2013.

⁶⁸ See *ibid.* at p.610.

applications filed by Ukraine.⁶⁹ These complaints concern (1) the Russian Federation assuming control over the Crimean peninsula from March 2014 and subsequent developments in Eastern Ukraine up to the beginning of September 2014 and (2) the alleged abduction of three groups of children in Eastern Ukraine and their temporary transfer to Russia on three occasions between June and August 2014. The Court is also dealing with 526 individual applications (brought under Article 34 of the ECHR) involving alleged Convention violations in Crimea and Eastern Ukraine. 307 of these applications are against both Russia and Ukraine, whilst 194 have been lodged against Ukraine and 25 solely against Russia.

⁶⁹ ECHR 122(2015), 13 April 2015.